MAX-BENEFIT SDN BHD

v.

PHUAH THEAN AN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-11-188-99]
16 OCTOBER 2000

LAND LAW: *Housing developers - Damages for late delivery - Purchaser assigned rights and interests in purchased property to bank in return for housing loan - Whether purchaser had locus standi to sue developer in view of assignment - Whether purchaser entitled to damages - Housing Developers (Control and Licensing) Regulations 1989, cl. 20(1) sch. G*

CONTRACT: *Sale and purchase of property - Damages for late delivery - Purchaser assigned rights and interests in purchased property to bank in return for housing loan - Whether purchaser had locus standi to sue developer in view of assignment - Whether purchaser entitled to damages - Housing Developers (Control and Licensing) Regulations 1989, cl. 20(1) sch. G*

CONTRACT: *Assignment - Sale and purchase of property - Assignment of purchaser's rights and interests in property to bank in return for housing loan - Whether assignment an absolute assignment - Whether purchaser entitled to sue developer for late delivery*

This was an appeal by the appellant housing developer against summary judgment in the magistrates' court given in favour of the respondents. The respondents had purchased a property ('the property') from the appellant and assigned their rights and interests in the property to a local bank in return for a housing loan.

The issues were: (1) whether the respondents had the *locus standi* to sue the appellant in view of the said assignment above; and (2) whether the respondents could sue the appellant for damages for late delivery.

Held:

[1] The assignment was purely for the purpose of securing the loan. The rights and interests over the property were assigned as surety to ensure that the loan would be repaid.

[2] The assignment of the equitable chose in action would come to an end and revert back to the respondents on one of two events taking place: (i) where the loan was fully repaid; and (ii) where the appellant obtained legal title to the property and the property was then transferred to the respondents with the consent of the assignee bank. Thus, the assignment was conditional and not absolute and was assigned by way of a charge to the assignee bank. As there was no absolute assignment, the assignee bank had no *locus standi* to sue the appellant. It followed that the respondents had the *locus standi* to sue the appellant.

[3] Clause 22 of the sales and purchase agreement of the property is a mandatory provision inserted pursuant to cl. 20(1) of sch. G to the Housing Developers (Control and Licensing) Regulations 1989 which entitles a purchaser to damages for late delivery. As vacant possession was delivered late on 22 June 1998 when in fact it should have been delivered on 15 September 1997, the respondents as purchasers were entitled to the liquidated damages they had claimed.

[Appeal dismissed.]

Case(s) referred to:
Durham Brothers v. Robertson [1898] 1 QB 765 ***(refd)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56 ***(dist)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)

For the appellant - Rajvinder Singh; M/s Dennis Nik & Wong
For the respondents - Anthony Kuan; M/s SM Kam & Assoc

Reported by Usha Thiagarajah

JUDGMENT

KC Vohrah J:

In this case the plaintiffs, two joint purchasers of a property from the defendant, a housing developer, had jointly assigned their rights title and interests in the sale and purchase agreement to Hock Hua Bank Berhad, in return for a loan from the bank to purchase the property. There was late delivery of the property which was a breach of one of the terms of the sales and purchase agreement. Summary judgment in the magistrates' court Kuala Lumpur was given in favour of the plaintiffs and the defendant has appealed against the decision of the court.

Two questions have been posed to this court in the appeal.

The first question is: can the two purchasers who had assigned their rights and interests in the sales and purchaser sue the developer?

The developer says the purchasers cannot do so as they had made an absolute assignment of their rights and interest in their property to the bank within the meaning of s. 4(3) of the Civil Law Act 1956 and relying on that provision and *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56 argue that only the bank has the right to sue it.

Nouvau Mont Dor (M) Sdn Bhd was decided on the peculiar facts in the case. Whether or not there has been an absolute assignment is dependent on what was the aim of the transaction.

The recital in the deed of assignment refers to the fact that the assignors-purchasers had applied for a loan and that the bank had agreed to grant to the assignors a loan "in the principal sum of Ringgit Malaysia Two Hundred Thousand (RM200,000 only) (hereinafter referred to as 'the loan') which expression shall include wherever the context so permits any balance or any part thereof **upon the security of the said Property** and upon the terms and conditions contained in the bank's letter(s) of offer to the assignor (s) dated 28 September 1994 and upon the terms and conditions of a loan agreement of even date ..." (emphasis added)

There is also reference to the fact that the separate document of title to the property that was purchased had yet to be issued by the relevant authorities.

The assignment is in the following terms:

> IN CONSIDERATION of the Bank agreeing to grant, granting and/or continuing to grant to the Assignor (s) the Loan upon the terms and conditions more particularly set out in the Loan Agreement, the Assignor (s) hereby ASSIGN absolutely unto the Bank all the Assignor (s)'s rights title and interests in and to the said Property by and under the Principal Sale Agreement and all other whatsoever deed (s) and agreement (s) (if any) mentioned herein and the full benefit and entire advantage thereof and of all stipulations therein contained and all remedies for enforcing the same which the Bank hereby accepts.
>
> AND PROVIDED ALWAYS that notwithstanding the Assignment herein contained or any other provision of this Assignment the Assignor (s) shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions, covenants and stipulations therein on the part of the Assignor (s) expressed and contained in the Principal Sale Agreement and all whatsoever deeds (s) and agreement (s) (if any) mentioned herein.

At the tail end of the assignment deed appears the consent by the developer to the assignment and there is expressed by the developer an undertaking to transfer the document of title of the strata title upon issuance of the title to the purchasers after seeking the bank's consent.

Although the assignment is stated to be absolute in effect it is not. The assignment was purely for the purpose of securing the loan. What I have adverted to show is that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interests over the property were assigned as surety to ensure that the loan will be repaid. The loan or any balance or part of it was given "upon the security of the same property."

The implication is that the assignment of the equitable chose in action would come to an end, it would revert back to the assigners on one of the two events taking place, whichever comes earlier. The first event is where the loan is frilly repaid. The second event is where the Developer has obtained the legal title to the property and the property is then transferred to the assignors-purchasers with the consent of the assignee bank.

Thus it is quite obvious that the assignment of the equitable estate in the property was conditional and was merely to secure the loan and was not an absolute assignment (see *Durham Brothers v. Robertson* [1898] 1 QB 765). The assignment to the bank was by way of charge only.

There was no absolute assignment in this case and the bank has no *locus standi* in this case. I therefore hold the purchasers as plaintiffs have *locus standi* to sue the developer-defendant.

The second question is this: can the purchasers sue for liquidated damages for late delivery? For late delivery and liquidated damages cl. 22 of the sales and purchase agreement provides in respect of the parcel of property as between the developer (as vendor) and the purchasers thus:

> (1) The said Parcel shall be completed by the Vendor and vacant possession with the connection of water and electricity supply to the said Parcel, shall be handed over to the Purchasers within thirty six (36) calendar months from the date of the Agreement.
>
> (2) If the Vendor fails to hand over vacant possession of the said Parcel, together with the connection of water and electricity supply to the said Parcel, in time, the Vendor shall pay immediately to the Purchasers liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

Vacant possession as per cl. 22(1) was to have been delivered on 15 September 1997, 36 calendar months from the date of the sales and purchase agreement.

Vacant possession was handed only on 22 June 1998.

Clause 22 of the sales and purchase is a provision which by virtue of sch. G to the Housing Developers (Control and Licensing) Regulations 1989 had to be mandatorily inserted into the sales and purchase agreement, it being a requirement of the prescribed contract under the said Regulations (see cl. 20 of Schedule G to the 2nd Regulation) except that while the clause relating to vacant possession in the Schedule had provided for the property to be handed over in 24 months (amended as at 1 August 1994) the developer had provided for delivery within 36 months.

Clause 20(1) of Schedule G, a statutory provision, envisages a purchaser, being entitled to damages for the late delivery he has suffered from the time he was supposed to have been given delivery up to the time he eventually was given vacant possession and effect must be given to the statutory provision which quantified the liquidated damages from day to day at the rate of 10 per centum per annum of the purchase price. Clause 22 of the sale and purchase agreement is a mandatory reflection of that statutory provision and effect must be given to the clause in the agreement.

There is no dispute that the vacant possession was supposed to have been delivered on 15 September 1997 and that in fact it was delivered late on 22 June 1998 and the purchasers as plaintiffs are entitled to the liquidated damages they have claimed.

Appeal dismissed with costs.